Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

RONALD E. EGAN, M.D.,

Petitioner,

v.

ATHOL MEMORIAL HOSPITAL, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI.

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46 pp

QUESTIONS PRESENTED.

I. Is pretextual sham peer review process: basis for legitimate disciplinary action? Plaintiff will prove the existence of a contract, combination, or conspiracy violation of Section 1 of Sherman Act, 15 U.S.C. (1988).

II. Should members of the quality assurance committee who have a vested interest in the outcome of the disciplinary review sit on the quality assurance committee?

III. Does the HCQIA confer upon members of the peer review group a position above the rule of law: allowing perjury, obstruction of justice and witness tampering which go to the heart of our trust for the judicial process?

IV. Does invocation of the "exculpatory no" 18 U.S.C. § 1000 (1988) in the presence of summary judgment and denial of a fair hearing render process of discovery a moot point?

PARTIES TO THE PROCEEDING.

The petitioner in this case is Ronald E. Egan, M.D., who was the plaintiff in the district court and an appellant before the U.S. Court of Appeals for the First Circuit.

The respondents are Athol Memorial Hospital, William J. Difederico, Osama Al-Masri, Jose M. Amparo, Myron Maron, C. Joseph Mathew, Corazon Maramag, Shameen Mennon, John Skrzypczak, and Cyrus Vakili.

TABLE OF CONTENTS.

Questions presented i

Parties to the proceeding ii

Table of authorities iii

Opinions below 1

Jurisdiction 2

Constitutional and statutory provisions involved 2

Introduction 3

Statement of the case 3

Reasons for granting certiorari 4

Conclusion 13

TABLE OF AUTHORITIES.

CASES:

American Tobacco Co. v. United States, 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946) 6

Ballough's of Coral Gables, Inc. v. Getz, 798 F.2d 1356 (11th Cir. 1986) 12

Bolt v. Halifax Hosp. Medical Center, 891 F.2d 810 (11th Cir. 1990) 5

Buckner v. Lower Florida Keys Hosp. Dist., 403 So.2d 1025 (Fla. Dist. Ct. App. 1981) 5

Cooper v. Forsyth County Hospital Auth., 789 F.2d 278 (4th Cir.), *cert. denied* 479 U.S. 972, 107 S.Ct. 474, 93 L.Ed.2d 418 (1986) 4

Hahn v. Oregon Physicians' Serv., 868 F.2d 1022, (9th Cir. 1988) *cert. denied* ___ U.S. ___, 110 S.Ct. 140, 107 L.Ed.2d 99 (1989) 7

Harvey v. Fearless Farris Wholesale, Inc., 589 F.2d 451 (9th Cir. 1979) 5

Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1492 (11th Cir. 1985) 11

Hughes v. Equitable Life Assurance Soc'y, 465 F.2d 743 (5th Cir. 1972) 12

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) 6

Monsanto Co. v. Spray-Rite Serv. Co., 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984) 7

NCAA v. Board of Renents, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984) 7

Oltz v. St. Peter's Community Hosp., 861 F.2d 1440 (9th Cir. 1988) 5

United States v. Griffith, 344 U.S. 100, 68 S.Ct. 941, 92 L.Ed. 1236 (1948) 7

United States v. Patten, 226 U.S. 525, 33 S.Ct. 141, 57 L.Ed. 333 (1913) 7

United States v. Plotke, 725 F.2d 1303 (11th Cir. (1984) 11

United States v. Russo, 717 F.2d 545 (11th Cir. 1983) ... 12

Weiss v. York Hosp., 745 F.2d 786 (3d Cir. 1984), *cert. denied* 470 U.S. 1060, 105 S.Ct. 1777, 84 L.Ed.2d 836 (1985) 4, 5

Winn v. Edna Hibel Corp., 858 F.2d 1517 (11th Cir. 1988) 6, 7

STATUTES AND RULES:

15 U.S.C. § 1 (1988) ..... *passim*
18 U.S.C. § 1000 (1988) i

Fed. R. Evid. 401 10
Fed. R. Evid. 403 11

MISCELLANEOUS:

Blumstein & Sloan, Antitrust and Hospital Peer Review, Law & Contemp. Probs. Spring 1988 ..... 6, 7

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OPINIONS BELOW.

The district court memorandum and order is reprinted as Appendix A at page 1a. The judgment of the Court of Appeals for the First Circuit is reprinted as Appendix B at page 23a. The panel opinion of the Court of Appeals for the First Circuit is reprinted as Appendix C at page 24a. The judgment of the Court of Appeals for the First Circuit is reprinted as Appendix D at page 26a.

JURISDICTION.

The judgment of the United States Court of Appeals for the First Circuit was initially entered in this case on January 6, 1998 and was reentered on June 4, 1998. The jurisdiction of this court is invoked under 15 U.S.C. § 1 (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Sherman Act, 15 U.S.C. § 1 provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

INTRODUCTION.

The plaintiff, Ronald E. Egan, M.D., general surgeon — peripheral vascular surgeon appears before the Supreme Court of the United States having been denied the standard quality assurance review dismissed at summary judgment involving the above named case *Egan* v. *Athol Memorial Hospital*. Cases [three in number] involve no medical malpractice; involve no general surgery; involve no written patient complaints; involve no personal injury. The defendants and coconspirators stand accused of failure of proper notice of service: four cases that were dismissed late in deposition, "piling on" of the cases and flummoxing fact pattern involving the three remaining cases. The defendants stand accused of perjury, subordination of perjury, obstruction of justice and the invocation of the "exculpatory no". The petition of writ of certiorari is submitted.

STATEMENT OF THE CASE.

Athol Memorial Hospital, its agent(s), and ten defendant doctor(s) stand accused of the following: Plaintiff will prove the existence of a contract, combination or conspiracy in violation of Section 1, Sherman Act, 15 U.S.C. (1988). The evidence must tend to prove:

1. an intent to adhere to an agreement;

2. designed to achieve an unlawful objective; but the existence need not show the conspirator(s) specific intent to restrain trade or monopolize.

Additionally, one does not need to prove that the agreement was designed to monopolize or restrain trade but only that it:

1. was not designed to achieve illegitimate business purpose; and

2. had an anticompetitive effect, in sum, was unlawful.

Proffered and admitted evidence will show existence of a pretextual sham peer review process . . . "evidence of irrational conduct that would create an inference of conspiracy".

REASONS FOR GRANTING CERTIORARI.

To establish a violation of Section 1 of the Sherman Act, a plaintiff must prove that two or more district entities agree to take action against him. The directed verdict(s) in this case would therefore have been proper, if as defendants contend, ten defendant doctors and agents from Athol Memorial Hospital were incapable of concerted action within the meaning of Section 1 of the Sherman Act. There is no basis, however, for holding that members of a medical staff are legally incapable of conspiring with one another. Each member practices medicine in his individual capacity; each is a separate economic entity potentially a competition for other physicians. *See Cooper* v. *Forsyth County Hospital Auth.*, 789 F.2d 278, 282 (4th Cir.) (Motz, J., concurring), *cert. denied* 479 U.S. 972, 107 S.Ct. 474, 93 L.Ed.2d 418 (1986); *Weiss* v. *York Hosp.*, 745 F.2d 786, 816 (3d Cir.1984), *cert. denied* 470 U.S. 1060, 105 S.Ct. 1777, 84 L.Ed.2d 836 (1985).

Additionally, we perceive no basis for holding that a hospital is legally incapable of conspiring with the members of its medical staff. Relying on the rule that a corporation cannot conspire with its officers and directors, *see, e.g., Harvey* v. *Fearless Farris Wholesale, Inc.*, 589 F.2d 451, 455 & n.7 (9th Cir.1979), some courts have held that a hospital cannot conspire with its medical staff for purposes of section 1 liability. *See, e.g., Weiss*, 745 F.2d at 817; *Buckner* v. *Lower Florida Keys Hosp. Dist.*, 403 So.2d 1025, 1029 (Fla. Dist. Ct. App.1981). We find this analogy faulty, however. The rule for corporations is based on conditions unique to the corporate context. Theoretically, a conspiracy involving a corporation and one of its agents would occur every time an agent performed some act in the course of his agency, for such an act would be deemed an act of the corporation. Thus, the rule that a corporation is incapable of conspiring with its agents is necessary to prevent erosion of the principle that section 1 does not reach unilateral acts. A hospital and the members of its medical staff, in contrast, are legally separate entities, and consequently no similar danger exists that what is in fact unilateral activity will be bootstrapped into a "conspiracy." *See Oltz* v. *St. Peter's Community Hosp.*, 861 F.2d 1440, 1450 (9th Cir.1988). Judge Tjoflat "perceive[d] no basis for holding that a hospital is legally incapable of conspiring with the members of medical staff." He explained that the *Copperweld* rule is designed to prevent erosion of the principle that section 1 does not reach unilateral acts." *See Bolt v. Halifax Hosp. Medical Center*, 891 F.2d 810 (11th Cir. 1990). For example, a vertical agreement among competitors (a hospital purchases a private practice Dr. Knight co-competitor and salaries a physician to compete in the relevant market). *Copperweld* "two . . . entities that previously pursued their own interests separately" would be

"combining to act as one for their common benefit." *Copperweld Corp.*, 467 U.S. at 768 [Dr. Knight denies secret contract, combination, or agreement in his sworn deposition page 11, line 9: "I had an associate join me."

In sum, then, we hold that a hospital and the members of its medical staff are all legally capable of conspiring with one another. *See generally* Blumstein & Sloan, "Antitrust and Hospital Peer Review," Law & Contemp. Probs. Spring 1988 at 7, 52-53 (finding this holding in panel's earlier opinion to be "sound").

To carry the burden of proof of this issue under section 1, a plaintiff may rely on either direct or circumstantial evidence. *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809-10, 66 S.Ct. 1125, 1139, 90 L.Ed. 1575 (1946). If the plaintiff provides direct evidence of conspiracy, the case becomes an easy one. Few cases, however, are that easy. Dr. Egan, like most section plaintiffs, has relied on circumstantial evidence — evidence of irrational conduct that would create an inference of conspiracy.

When relying on circumstantial evidence to prove the existence of a conspiracy, a plaintiff first must show a nonlegitimate motive for entering into such a conspiracy. *See Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 596-97, 106 S.Ct. 1348, 1361, 89 L.Ed.2d 538 (1986). In other words, "the plaintiff must show that the conspiracy alleged is an economically reasonable one" — i.e., one that would inure to the defendants' economic benefit. *Winn* v. *Edna Hibel Corp.*, 858 F.2d 1517, 1519 (11th Cir.1988). Second, a plaintiff must adduce evidence that tends to exclude the possibility that the alleged coconspirators acted independently and in a manner consistent with rational business objectives. *Monsanto Co.* v. *Spray-Rite Serv. Co.*, 465

U.S. 752, 764, 104 S.Ct. 1464, 1471, 79 L.Ed.2d 775 (1984); *Winn*, 858 F.2d at 1519-20.

A section 1 plaintiff, however, need not prove an intent on the part of the coconspirators "to restrain trade or to build a monopoly." *United States* v. *Griffith*, 334 U.S. 100, 105, 68 S.Ct. 941, 944, 92 L.Ed. 1236 (1948). So long as the purported conspiracy has an anticompetitive effect, the plaintiff has made out a case under section 1. *See NCAA* v. *Board of Renents*, 468 U.S. 85, 101 n. 23, 104 S.Ct. 2948, 2960 n. 23, 82 L.Ed.2d 70 (1984); *United States* v. *Patten*, 226 U.S. 525, 543, 33 S.Ct. 141, 145, 57 L.Ed. 333 (1913); *Hahn* v. *Oregon Physicians' Serv.*, 868 F.2d 1022, 1026 (9th Cir.1988) *cert. denied* ___U.S. ___, 110 S.Ct. 140, 107 L.Ed.2d 99 (1989). Therefore, in determining whether conspiracy exists, if a motive for conspiracy is evident, then the court must decide whether the plaintiff has adduced evidence that reasonably tends to prove a "conscious commitment" on the part of the alleged coconspirators to enter into a scheme "designed to achieve an unlawful objective." *Monsanto*, 465 U.S. at 764, 104 S.Ct. at 1471. In other words, the evidence must tend to prove (1) an intent to adhere to an agreement (2) designed to achieve an unlawful objective; but the evidence need not show that the coconspirators specifically intended to restrain trade or to monopolize. We now apply this test to the purported AMH conspiracy.

The alleged AMH coconspirators argue they had no rational economic motive for conspiring to deny Dr. Egan's Section A hospital privileges. Plaintiff disagrees. One of the first principles of economics is the inverse relationship of supply to price. If doctors in a hospital can exclude other doctors from practicing in that hospital, then obviously the remaining doctors can charge a higher price for their services. *See Bloomstein & Sloan, supra* at 9, 15. Furthermore,

as the defendants' own argument suggests, a negative decision at one hospital could affect a decision at another hospital (Mary Lane Hospital) [;] Therefore, as two commentators have noted, a negative decision by one hospital could be "tantamount to excluding a doctor from the profession as a whole." [Mary Lane Hospital]

The second prong of the contract, combination, or conspiracy test: whether Dr. Egan presented, or could have presented, evidence that tended to exclude the possibility that the alleged coconspirators acted legitimately and independently. Does the evidence tend to prove (1) that the coconspirators intended to enter into an agreement, and (2) that the agreement was designed to achieve an unlawful objective. Again, one does not need to prove that the agreement was designed to monopolize or restrain trade but only that it (1) was not designed to achieve a legitimate business purpose and (2) had an anticompetitive effect.

Because the district court refused to admit certain evidence that might have shown the existence of an agreement designed to achieve an unlawful objective.

As already noted, Dr. Egan proposed to show that certain members of the Athol Memorial Hospital peer review committees knowingly suborned false evidence against him and that these individuals had personal motives for subverting the peer review proceedings. Plaintiff proposed to use *Athol Police Department* interoffice correspondence [a trilogy of three letters] to attack as pretextual some of the grounds of the AMH defendants' decisions (patient [27] unequivocally refused treatment in the emergency at Athol Memorial Hospital). Dr. Egan indicated in his proffer to the Supreme Court that the *Athol Police Department's* interoffice correspondence which showed the AMH defendants' based their decisions in part on two incidents that called Dr. Egan's medical

and professional judgment into question. Dr. Egan proposed to show that the medical staff at the AMH investigated the incidents patient [27], and, based on the findings from the investigation, AMH decided to revoke his privileges. The *Athol Police Department's* interoffice correspondence is prepared to testify that they reviewed the facts underlying the AMH investigation and concluded that no reasonable medical practitioner would have reached the same conclusions as those reached by the AMH investigators.

Additionally, plaintiff will indicate in his proffer to the Supreme Court that *Dr. Schwartz'* [expert witness testimony] which showed that the AMH defendants' based their decisions in part on two incidents that called Dr. Egan's medical and professional Section A judgment into question.

1. Dr. Egan will prove that Dr. Schwartz, [the defendant's expert], knew or should have known, three of the codefendants and may have entered into an unlawful agreement with them. In his sworn deposition, Dr. Schwartz denies knowing three defendant doctors see page(s) [7] [106] experts sworn testimony.

2. Dr. Schwartz was not informed completely and accurately regarding patient [189] [*obstruction of justice*]. The Quality Assurance Committee withheld [obstruction of justice] [*Exhibit #5 Hoffman*] page 1, paragraph 2 and I quote, "*Since I was not present to evaluate personally the patient's [189] condition, or the EKG findings.*" Letter marked post 4/92. In contrast, [Exhibit #4 Hoffman] regarding second letter- to the Quality Assurance Committee and I quote, "as stated in

> Dr. Egan's letter on June 26,(1992), it is true that I was present in the Athol Emergency Room (July 14, 1991)." Letter dated 7/9/92.

The defendants' objected to the proffered evidence on two grounds. First, they objected on the relevancy grounds, arguing that the proffered evidence failed, as a matter of law, to raise inference of conspiracy. Second, they objected to that even if it were relevant, it should be excluded because it would unnecessarily confuse the jurors by forcing them to consider complicated facts that had no direct relationship to the subject matter of the antitrust litigation. We disagree.

We conclude: the district court erred to the extent that its exclusion of the *Athol Police Department* interoffice correspondence [a trilogy of three letters] and Dr. Schwartz' testimony was based on relevancy grounds. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Clearly, Dr. Egan's proffered evidence was relevant. If the evidence showed that the AMH investigations conclusions were so baseless that no reasonable medical practitioner, considering the same set of facts could have reached these conclusions, than a fact finder could easily infer from that evidence that the hospital and its peer review committees intended to enter into an agreement designed to achieve an end not dictated by legitimate business concern. And, of course, such an agreement would have an anticompetitive effect by excluding Dr. Egan from the competition with other doctors at the hospital.

We recognize that the district court might have excluded the *Athol Police Department* interoffice correspondence [a

trilogy of three letters] and Dr. Schwartz' testimony on the alternative ground that the testimony would unnecessarily confuse the jurors. Under Fed. R. Evid. 403, relevant evidence "may be excluded if the probative value is substantially outweighed by the danger of confusion of the issues or misleading the jury." We have noted that exclusion of relevant evidence pursuant to Rule 403 is an extraordinary remedy to be used sparingly." *United States* v. *Plotke*, 725 F.2d 1303, 1308 (11th Cir.1984). A trial court's ruling pursuant to Rule 403, however, will not be disturbed absent an abuse of discretion. *See Hendrix* v. *Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1501 (11th Cir.1985). Assuming that the district court based its ruling on Rule 403, we find such an abuse here.

The district court misunderstood the legal import of the proffered evidence: in its view, the evidence had no probative value as a matter of law. Although the district court expressly limited its initial inquiry to the contract, combination, and conspiracy requirement, it seemed more concerned with whether the proffered evidence was relevant to the reasonableness of the agreement's anticompetitive effect. The district court noted that proof of a jealous or hostile intent (v. perjury: material and intentional) on the defendants" part was not relevant because "[u]nder the Rule of Reason only agreements which are unreasonably restrictive of competition violate Section 1 of the Sherman Act." Whether or not the rule of reason applies to this case, or whether or not the proffered evidence is relevant to the rule of reason analysis are simply not yet at issue. By virtue of the district courts own express limitation, we are concerned only with whether the evidence could tend to support a finding of contract, combination, or conspiracy.

Laboring under its misapprehension of the law, the district court obviously could not have made a sound judgment that the probative value of the evidence was substantially outweighed by the danger of confusing the jury. Because Dr. Egan's proffered evidence might have provided the only basis upon which trier of fact could have found a contract, combination, or conspiracy, the probative value of that evidence was extremely high. *See United States* v. *Russo*, 717 F.2d 545, 551-52 (11th Cir.1983). (When evidence essential to prove element of offense, probative value very high). We therefore have a "definite and firm conviction" that the district court erred in excluding the proffered evidence and thus abused its discretion. *See Ballogh's of Coral Gables, Inc.* v. *Getz*, 798 F.2d 1356, 1358 (11th Cir.1986) (en banc).

In sum, we conclude that the district court erred in prohibiting Dr. Egan from introducing evidence that the peer review proceedings were a sham: a pretextual sham peer review process [*see Boczar* v. *Manatee*, 993 F.2d 1514] and that the AMH defendants' reasons for revoking his staff privileges were pretexts. When reviewing a district court's grant of a directed verdict or judgment n.o.v., we must view the evidence in light most favorable to the party against whom the motion for directed verdict or judgment n.o.v. is made. *Hughes* v. *Equitable Life Assurance Soc'y*, 465 F.2d 743, 744 (5th Cir.1972). Viewing the proffered and admitted evidence in the light of most favorable to Dr. Egan, we think that it clearly tends to prove the existence of contract, combination, or conspiracy violation of section 1 of the Sherman Act, 15 U.S.C. § 1 (1988). The evidence must tend to prove:

1. that the coconspirators intended to enter into an agreement, and

2. that the agreement was designed to achieve an unlawful objective. Again, one does not need to prove that the agreement was designed to monopolize or restrain trade but only that it (1) was not designed to achieve a legitimate business purpose and (2) had an anticompetitive effect. Because the district court refused to admit certain evidence that might have shown the existence of an agreement designed to achieve an unlawful objective.

In sum, plaintiff requests; more just system of review: avoiding and subverting independent discovery pretextually.

Finally, Licensed physicians in the Commonwealth of Massachusetts work with 52% membership HMO's statewide. Nationally, a surplus of physicians is predicted: approximately 145,000 according to GMENAC.

CONCLUSION.

WHEREFORE, the judgment of the Appeals Court should be reversed. The case should be remanded for entry of judgment in favor of Dr. Egan, or for further proceedings consistent with the opinion of the Court.

Respectfully submitted,

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APPENDIX TABLE OF CONTENTS.

District Court Memorandum and Order 1a

Judgment of the Court of Appeals for the First Circuit 23a

Panel Opinion of the Court of Appeals for the First Circuit 24a

Judgment of the Court of Appeals for the First Circuit 26a

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RONALD E. EGAN,	)	
Plaintiff,	)	
v.	)	Civil Action NO. 94-40158-NMG
ATHOL MEMORIAL HOSPITAL, et al.,	)	
Defendant	)	

MEMORANDUM AND ORDER

GORTON, J.

The plaintiff, Ronald E. Egan, M.D. ("Egan") has sued Athol Memorial Hospital ("Athol"), its president and ten doctors due to their participation in a medical peer review process which in 1994 resulted in termination of Egan's medical staff membership and privileges at Athol. Plaintiff seeks damages and injunctive relief under Sections 1 and 2 of the Sherman Antitrust Act, Sections 4 and 5 of the Massachusetts Antitrust Act and Sections 2 and 11 of the Massachusetts Consumer Protection Act. In addition, plaintiff seeks damages for bad faith and unreasonableness. The de-

fendants have filed a Joint Motion for Summary Judgment which is opposed by plaintiff.

I. Facts

The following relevant facts are 1) agreed upon by the parties, 2) not specifically contradicted by the plaintiff, or 3) assumed from letters, minutes of meetings and depositions submitted in support of and opposition to the motion. The facts are viewed in the light most favorable to the plaintiff. See O'Connor v. Steeves, 994 F.2d 905, 907 (1st Cir.1993).

A. Background

In November of 1981, Egan applied for appointment to the attending medical staff of the hospital and requested surgical privileges. On March 2, 1982, Egan was appointed to the active medical staff of Athol, and his request for surgical privileges was approved later that month.

On July 28, 1986, the first recorded Incident Report was issued against Egan. Later that year, a letter was sent to Dr. Charles Pierson, a member of the Executive Committee, from the members of Athol's Maximum Care Unit Committee in which they noted three Maximum Care Unit ("MCU") cases which were viewed as having been inadequately managed by Egan. The MCU Committee issued a recommendation and suggested that Egan be invited to discuss the three cases and the recommendation with the MCU Committee or the Executive Committee. As a consequence, Athol's Ad Hoc Committee on Professional Conduct met with Egan on February 13, 1987. Egan agreed with the recommendations

of the MCU Committee that 1) he be required to consult an appropriate internal medicine specialist or sub-specialist for each of his admissions to the MCU whether they be medical or surgical in nature, 2) his future admissions were to be monitored, and 3) if he did not follow the Committee's recommendations, further action could be taken.

On February 4, 1988, Mr. DiFederico, President of Athol, submitted a report to the Massachusetts Board of Registration in Medicine informing it that, based upon a review by Athol's Tissue Committee, Egan was required to be supervised by a senior surgeon for his next ten dilation and curettage procedures, and that Egan was required to have medical and surgical consults on all of his MCU admissions.

In December, 1988, three nurses wrote letters about a contemporaneous incident in which Egan had been called in to assist with a patient. The nurses alleged that Egan was acting inappropriately and suspected that he was intoxicated. He was informed in writing of the complaint, denied that he was intoxicated and complained that the unprofessional way in which the surgical call had been executed influenced his behavior on the evening in question.

From October to December, 1989, Egan was often cited for incomplete and late medical charts. During the same period, Athol's Utilization Review Committee conducted a study of Egan's discharge plans and concluded that those plans accounted for up to 50% of Athol's total readmissions.

In 1990 and thereafter, defendants continued to receive complaints from nurses, staff and other physicians about Egan's clinical competence and professional behavior. The defendants conducted an investigation into each of the complaints, and several cases were identified as being of particular concern with regard to the appropriateness of care rendered by Egan. He was asked to respond, both orally and

in writing, to the peer review committees' concerns, which he did on numerous occasions. In the meantime, his application for reappointment dated September 21, 1991 was taken under consideration. .

At about the same time, Egan filed complaints about alleged substandard treatment provided by several Athol physicians. For instance, in November, 1991, Egan wrote two variance reports complaining of one doctor's performance and one variance report complaining of a second doctor's performance. In April of that year, he made, written complaints against two other doctors.

B. Six of Egan's Cases Scrutinized

In November 1992, after reviewing additional information provided by Egan, the Executive Committee of the Medical Staff retained an independent medical reviewer to review six of Egan's cases. The reviewer concluded that four of the cases indicated significant inadequacies in Egan's medical care.

Plaintiff retained his own experts to evaluate and render opinions on the quality of the care he provided. Several expert reports were written before the disputed disciplinary action was taken by Athol, and additional letters were submitted after litigation ensued. Those letters addressed some of the cases that later served as the basis for the disputed disciplinary action ("course requirements") as well as other cases, and the opinions rendered therein ranged from finding that Egan was somewhat at fault to declaring that he was not incompetent.

Patient #1 was one of the six patients who was of particular concern to the MCU Committee, and one of the four

patients whose care by Egan had been found to be inadequate by the independent medical reviewer. Egan contended in an affidavit, however, that a fellow physician was either wrong or purposefully misstated facts about the care of patient #1 and that the same physician, who blamed an alleged delay in diagnosis on Egan, was really at fault himself for failing to respond.

C. The Professional Review Resulting in the Disciplinary Action at Issue

The decision that Egan's reappointment to the medical staff at Athol would be conditioned upon his taking additional required courses within six months was arrived at between June and October, 1993 through a series of meetings, written communications and phone conversations between the defendants and Egan or his former attorney. Specifically, the Medical Staff Executive Committee (the "Committee") addressed the matter at three separate meetings, the last being a general meeting of the staff in September, 1993. Minutes of meetings of both the Committee and the staff show that the decision on Egan was unanimously approved. During the September, 1993 staff meeting, a written recommendation was distributed indicating that a review had been made of the opinions of Egan's experts. Egan declined the opportunity to provide additional information.

After the Committee first recommended that Egan be required to complete course requirements, Egan made it clear that he would refuse to fulfill those requirements and requested both that he be afforded a hearing and that the Committee comply with the Medical Staff By-laws in any decision it made. After the September meeting, which was

held in accordance with those Bylaws, a letter was sent by certified mail to Egan informing him that he was entitled to a hearing before an ad hoc committee if he so requested within 14 days. Egan did not, however, open that letter until after the 14 days had elapsed. In October, 1993, Egan spoke to and corresponded with DiFederico and requested a hearing regarding his cases which had been examined during the preceding several years. The request was denied in a letter in which DiFederico informed Egan that he had waived his right to a hearing.

On December 14, 1993 the Hospital nevertheless reappointed Egan to the active medical staff of Athol for one year, conditioned upon his completion of selected courses within six months. In addition, all of Egan's cases were to be reviewed. Egan refused to take the required courses and his staff membership and clinical privileges were terminated automatically on June 15, 1994, after which he commenced this lawsuit.

II. Standard of Review

The role of summary judgment is "to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Mesnick v. General Elec. Co., 950 F.2d 816, 822 (1st Cir. 1991), cert. denied, 504 U.S. 985 (1992) (quoting Garside v. Osco Drug, Inc., 895 F.2d 46, 50 (1st Cir.1990)). The burden is upon the moving party to show, based upon the pleadings, discovery on file, and affidavits, "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court must view the entire record in the light most hospitable to the non-moving

party and indulge all reasonable inferences in his favor. Connor v. Steeves, 994 F.2d at 907.

If the moving party demonstrates that there is "an absence of evidence to support the non-moving party's case," the burden shifts to the non-moving party to establish the existence of a genuine issue of material fact. FDIC v. Municipality of Ponce, 904 F.2d 740, 742 (1st Cir.1990) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). The nonmovant, however, may not rest upon mere allegation or denial of the pleadings. Fed.R.Civ. P. 56(e).

This Court will first address the question of whether the defendants are entitled to immunity under the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101-11152 ("HCQIA"), and then analyze each of plaintiff's five counts.

III. Defendants' Claim of Immunity

A. Immunity Under HCQIA

HCQIA provides incentive and protection for physicians who participate in effective professional peer review. 42 U.S.C. § 11101(5). The statute "grants immunity to professional review bodies, and those who assist such bodies, in connection with professional review action, provided that the requirements of section 11112(a) are met." Sklaroff v. Allegheny Health Education Research Foundation, 1996 WL 383137, at *6 (E.D. Pa. July 8, 1996). The requirements for immunity for professional review actions are satisfied if the professional review action is taken:

> (1) in the reasonable belief that the action was in the furtherance of quality health care,
> (2) after a reasonable effort to obtain the facts of the matter,
> (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

42 U.S.C. § 11112(a). These requirements, as they relate to the case at hand, are discussed below.

Courts utilize an objective standard of reasonableness when considering whether a defendant has met the statutory requirements. Sklaroff at *6 (citing Mathews v. Lancaster Gen. Hosp., 87 F.3d 624, 635 (3rd Cir.1996)) ("Mathews II"). It is important to note that "a defendant's subjective bad faith or hostility is irrelevant." Id. Whether defendants are entitled to immunity under the HCQIA is a "question of law for the court to decide whenever the record is sufficiently developed." Sklaroff at *6 (citing Bryan v. James E. Holmes Regional Medical Ctr., 33 F.3d 1318, 1332 (11th Cir. 1994), cert. denied, 115 S.Ct, 1363 (1995)).

HCQIA states that there is a presumption that a professional review action has met the statutory requirements unless the presumption is rebutted by a preponderance of the evidence. 42 U.S.C. §11112(a). The burden is therefore on the plaintiff to prove that the defendants failed to meet those requirements. Benjamin v. Aroostook Medical Center, 937 F.Supp. 957, 973 (D.Me. 1996) (citing Bryan, 33 F.3d at

1333). In reviewing summary judgment orders under HCQIA, the Court must determine whether the plaintiff has "satisfied his burden of producing evidence that would allow a reasonable jury to conclude that the Hospital's peer review disciplinary process failed to meet the standards of the [Act]." Mathews II at 633 (quoting Bryan, 33 F.3d at 1334).

1. Reasonable Belief That The Action Was In The Furtherance Of Quality Health Care

Section 11112(a)(1) is satisfied if "the reviewers, with the information available to them at the time of the professional review action, would reasonably have concluded that their action would restrict incompetent behavior or would protect patients." Sklaroff at *7 (quoting H.R. Rep. No. 903, at 10). In its evaluation, a court should utilize an objective standard which focuses on the totality of the circumstances. Mathews II, 87 F.3d at 635 (quoting Imperial v. Suburban Hosp. Ass'n, Inc., 37 F.3d 1026, 1030 (4th Cir.1994)).

Even considered in a light most favorable to the plaintiff, a review of Egan's performance while on the medical staff at Athol and of the disciplinary actions taken against him along the way indicate that the defendants had the requisite "reasonable belief" to support their action. Plaintiff has presented no evidence that the professional review action taken by Athol was motivated by anything other than a reasonable belief that it would further quality health care. See Mathews II, 87 F.3d at 635. The opinions of Egan's experts are to no avail because even if Egan could show that defendants reached an incorrect conclusion on a particular medical issue, "that does not meet the burden of contradicting the existence of a reasonable belief that they were furthering health care

quality in participating in the peer review process." Imperial, 37 F.3d at 1030. This Court concludes, therefore, that defendants had a reasonable belief that the action they took was in the furtherance of quality health care.

2. Reasonable Effort To Obtain The Facts

Under HCQIA, 42 U.S.C. §11112(a)(2), a professional review action must be taken after a reasonable effort to obtain the facts of the matter. It is important to note that "nothing in the Act requires that a physician be permitted to participate in the review of his care." Sklaroff at *8. Also, "[p]laintiff is entitled to a reasonable investigation under the Act, not a perfect investigation." Id. at *8 (citing 42 U.S.C. § 11112(a)(2)).

Although plaintiff alleges that defendants' peer review process was a sham, the evidence is insufficient to rebut the presumption that defendants complied with the standard of fact gathering set forth in 42 U.S.C. § 11112(a)(2). Defendants' efforts in this case, shown through correspondence between Egan, Athol and Mr. DiFederico, and the minutes from various committee meetings, are similar to those of the defendants in Fobbs v. Holy Cross Health System Corp., 789 F.Supp. 1054 (E.D.Cal. 1992), aff'd 29 F.3d 1439 (9th Cir.1994), cert. denied, 115 S.Ct. 936 (1995). In Fobbs, prior to imposition of sanction, the plaintiff was given an opportunity to discuss cases, and, after monitoring began, defendants continued to gather facts, conducted additional internal investigation of the plaintiff's cases and asked an outside reviewer to evaluate the cases. Fobbs, 789 F.Supp. at 1066-67. The Fobbs Court found that defendants made a reasonable effort to obtain the facts of the matter. Id. at 1066.

Again, considering the facts in the light most favorable to the plaintiff, he has fallen short in his effort to rebut the presumption that defendants made a reasonable effort to obtain the facts. Defendants, consideration, review and discussion of their concerns about plaintiff's performance satisfied the reasonable effort standard.

3. Adequacy of Notice And Hearing Procedures

A professional review action must be taken "after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances." 42 U.S.C. § 11112(a)(3). Safe harbor procedures are set forth in 42 U.S.C. § 11112(b) which, if followed, will satisfy the notice and hearing requirements of the statute. Mathews v. Lancaster General Hosp., 883 F.Supp. 1016, 1033 (E.D.Pa. 1995) aff'd 87 F.3d 624 (3rd Cir. 1996) ("Mathews I"). However, the safe harbor provisions also provide that "[a] professional review body's failure to meet the conditions described in this subsection shall not, in itself, constitute failure to meet the standards of subsection (a)(3) of this section." 42 U.S.C. § 11112(b). It is important to note that "[t]he ultimate inquiry is whether the notice and hearing procedures were adequate." Mathews I, 883 F.Supp at 1033-34 (quoting Smith v. Ricks, 31 F.3d 1478, 1486 (9th Cir.1994), cert. denied, 115 S.Ct. 1400 (1995)).

Although Egan correctly points out that he was not afforded thirty days within which to request a hearing as specified in 42 U.S.C. § 11112(b)(1)(B)(ii), the controlling question is whether he has shown, by a preponderance of the evidence, that the defendants did not provide him with fair

and adequate process. Islami v. Covenant Medical Center, Inc., 822 F.Supp. 1361, 1377 (N.D. Iowa 1992). A plaintiff may not "strip a defendant of the protections of the Act merely by failing to complete the entire scope of review procedures available to him." Mathews I, 883 F.Supp at 1034. Egan failed to request a hearing within fourteen days as was offered by defendants. Furthermore, the statute clearly states that failure to meet its conditions of notice does not, in itself, constitute failure to meet the statutory standard. 42 U.S.C. § 11112(b). Based upon the affidavits, letters and depositions submitted, the relevant law and arguments of counsel, this Court determines that the notice and hearing procedures were adequate.

4. Reasonable Belief That The Action Was Warranted By The Facts Known

A professional review action must be taken "in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3)." 42 U.S.C. § 11112(a)(4). In making such an evaluation, the Court must not reweigh the evidence or substitute its own judgment for that of the peer review committee. Sklaroff at *9 (citing Bryan, 33 F.3d at 1337). The appropriate inquiry is "whether the decision was reasonable in light of the facts known at the time the decision was made, not in light of facts later discovered." Sklaroff at *9.

Had the review committee consciously joined with members of the hospital staff to manufacture or exaggerate incidents or had anyone been economically motivated to conspire to restrain plaintiff's practice, defendants would be

unreasonable to believe their conduct constituted a legitimate peer review. See Boczar v. Manatee Hospitals & Health Systems, Inc., 993 F.2d 1514, 1518 (11th Cir.1993). However, even indulging all reasonable inferences in plaintiff's favor, Egan has produced no evidence, beyond mere allegation, to show that anyone at Athol exaggerated or manufactured complaints or had a clear economic motive to deny privileges to him. Nor has he produced evidence sufficient to demonstrate a genuine issue of material fact regarding the reasonableness of defendants' belief that the professional review action was warranted.

Plaintiff's expert reports do not suffice because it has been found that

> [w]hile . . . conflicting expert reports raise an issue of fact as to the adequacy of care provided by [the plaintiff], they do not rebut the presumption that the Board made its decision in the reasonable belief that it was warranted by the facts known.

Mathews II, 87 F.3d at 638. In the instant case, as in Mathews, the reports that defendants relied upon were not so obviously mistaken or inadequate as to render reliance on them unreasonable.

5. Conclusion

This Court has determined that the professional review action was taken 1) in the furtherance of quality health care, 2) after a reasonable effort to obtain the facts, 3) after adequate notice and hearing procedures, and 4) in the reasonable

belief that the action was warranted by the facts known. It therefore concludes that, as a matter of law, defendants are immune and thus not liable in damages for participating in the peer review process and ultimately for terminating plaintiff's staff privileges.

B. State Law Immunity

The issue of state law immunity, granted pursuant to M.G.L. c. 111, § 203(c), need not be addressed because it has already been determined that immunity is granted under HCQIA. Because defendants, professional review action satisfies all of the requirements of 42 U.S.C. §11112(a), they "shall not be liable in damages under any law of the United States or of any State . . . with respect to the action." 42 U.S.C. § 11111(a).

IV. Defendants' Motion for Summary Judgment Regardless of Immunity

Although HCQIA grants defendants immunity from all monetary damages in this case, it does not grant immunity from the injunctive relief plaintiff claims. Nevertheless, viewing the record in a light most hospitable to Egan, the defendants have demonstrated an absence of evidence to support Egan's claims and Egan has failed to establish the existence of genuine issues of material fact with respect to such claims. This Court will, therefore, grant summary judgment to the defendants on each of plaintiff's claims discussed seriatim.

A. Plaintiff's Antitrust Claims

Plaintiff's complaint seeks damages and injunctive relief through Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 & 2, Sections 4 and 5 of the Massachusetts Antitrust Act, M.G.L. c. 93, and Sections 2 and 11 of the Massachusetts Consumer Protection Act, M.G.L. c. 93A. This Court works from the premise that antitrust laws protect "competition, not competitors," Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) and that "[i]t is only when the market is being distorted by anticompetitive conduct that the antitrust laws should be invoked." Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1573 (11th Cir.1991).

1. Count I - Conspiracy In Restraint Of Trade

In order to prove a violation of Section 1 of the Sherman Act, a plaintiff must establish the existence of an agreement in the form of a contract, combination or conspiracy among at least two legally distinct persons or entities that imposes an unreasonable restraint on trade. Oksanen v. Page Memorial Hosp., 945 F.2d 696, 702 (4th Cir.1991), cert. denied, 502 U.S. 1074 (1992) (citing White & White, Inc. v. American Hosp. Supply Corp., 723 F.2d 495, 504 (6th Cir.1983)). Before the elements of a claim under Section 1 are even addressed, however, the plaintiff must show that the alleged agreement would affect interstate commerce. Oksanen, 945 F.2d at 702, n.1 (citing Summit Health, Ltd. v. Pinhas, 500 U.S. 322 (1991)). In the instant case, Egan argues that much of his practice concerned Medicare and Medicaid patients and therefore had a significant impact upon interstate com-

merce. He next focuses on his attempt to prove the existence of a conspiracy.

The defendants point out that in Mathews, where a hospital board had ultimate decision making authority

> [s]imply making a peer review recommendation does not prove the existence of a conspiracy [among the hospital and its staff]; there must be something more such as a conscious commitment by the medical staff to coerce the hospital into accepting its recommendation.

Mathews II, 87 F.3d at 639 (quoting Oksanen, 945 F.2d at 706). Defendants contend that there is no evidence of such a conscious commitment in the case at bar and, therefore, there was no conspiracy.

Egan argues that there is a capacity to conspire here which should preclude summary judgment on this narrow issue. He states that it has been recognized that

> a medical staff can be comprised of physicians with independent . . . competing economic interests [and that] when these actors join together to take action among themselves, they are unlike a single entity-and therefore they have the capacity to conspire as a matter of law.

Oksanen, 945 F.2d at 706. The plaintiff, however, fails to acknowledge, as defendants do, that Oksanen further explained that "there must be something more such as a conscious commitment by the medical staff to coerce the hospi-

tal into accepting its recommendation." Id. Egan merely alleges that because he had submitted complaints against several Athol physicians, the defendants agreed amongst themselves and others to adopt and impose arbitrary conditions upon plaintiff's reappointment to Athol's staff so as to exclude him from practicing at Athol.

This Court has determined that the Board voted to restrict the plaintiff's privileges for valid health care reasons. As in Mathews, Egan has produced no evidence that tends to exclude the possibility that the Board acted independently, and this Court, therefore, declines to infer an antitrust conspiracy. See Mathews II, 87 F.3d at 640-41.

2. Count II - Monopolization

Plaintiff claims that defendants violated Section 2 of the Sherman Act by participating in the offenses of monopolization and conspiracy to monopolize. There are two factors which must be satisfied in order to establish the offense of monopolization:

> (1) the possession of monopoly power in the relevant market, and
> (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Oksanen, 945 F.2d at 710 (quoting Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 596, n. 19 (1985)).

Egan has offered little to no evidence to support a definition of the relevant market, so the existence of monopoly power cannot be demonstrated. See Oksanen, 945 F.2d at 710. Even if such power-could be demonstrated, Egan has not offered any evidence to prove that a fact finder could find no valid business reason or concern for efficiency in Athol's revocation of his privileges. See id. Thus, just as there is no evidence of conspiracy by the hospital and medical staff relevant to Section 1, there is no evidence of conspiracy under Section 2. Id. The Court determines, therefore, that there is no genuine issue of material fact with respect to plaintiff's Section 2 claim.

3. The Massachusetts Antitrust Act Component of Counts I and II

The Massachusetts Antitrust Act provides that it "shall be construed in harmony with judicial interpretations of comparable federal antitrust statutes insofar as practicable." M.G.L. c. 93, §1. Because this Court has determined that the plaintiff has failed to satisfy the requirements of Sections 1 and 2 of the Sherman Act, the state law antitrust claims, therefore, likewise fail. See Oksanen, 945 F.2d at 710. Summary judgment will be entered in favor of the defendants on Counts I and II.

B. Plaintiff's Other State Law Claims

1. Count III-Tortious Interference

In order to prove a claim of tortious interference with an advantageous relationship, a plaintiff must prove

> (1) a business relationship or contemplated contract of economic benefit,
>
> (2) the defendant's knowledge of such relationship,
>
> (3) the defendant's intentional and malicious interference with it, and
>
> (4) the plaintiff's loss of advantage directly resulting from the defendant's conduct.

Comey v. Hill, 387 Mass. 11, 19 (1982) (quoting J.R. Nolan, Tort Law § 72, at 87 (1979)); c.f. United Truck Leasing v. Geltman, 406 Mass. 811, 816 (1990) (adopting the word "improperly" in place of "maliciously," but agreeing that more than intentional interference is required).

Egan alleges that defendants engaged in a deliberate and willful conspiracy to remove his privileges. He asserts that defendants misstated medical records, ignored undeniable medical evidence, claimed violations of sound medical practice without medical support and did not fairly or justly do their jobs. He claims that such actions caused him to lose numerous patients and thereby intentionally interfered with his patient relationships of which defendants were aware.

Defendants argue that plaintiff's claim in Count III fails because not only were defendants, actions neither improper nor malicious (factor #3) but their actions were required under both federal and state law. Furthermore, they maintain that their actions could not have directly caused plaintiff's loss of any advantageous relationship with his patients because the termination of his privileges occurred only after he refused to attend limited continuing education courses. Finally, in order to recover for tortious interference with advantageous relationships, defendants assert that Egan must also prove that defendants, actions were unrelated to any legitimate interest of the hospital (Boothby v. Texon, Inc., 414 Mass. 468, 487 (1993)), and that plaintiff has offered no evidence in support of such a claim.

This Court discerns no evidence of malicious or improper interference with any of Egan's business relationships by the defendants. It determines that plaintiff has not met his burden of showing a genuine issue of material fact, at least as to this element of his claim, and summary judgment will, therefore, be granted in favor of defendants with respect to Count III.

2. Count IV - Consumer Protection Act (M.G.L. c. 93A)

A plaintiff in a Chapter 93A claim must demonstrate that "the defendant's actions fell within at least the penumbra of some common-law, statutory, or other established concept of unfairness, or were immoral, unethical, oppressive or unscrupulous." Damon v. Sun Co., Inc., 87 F.3d 1467, 1484 (1st Cir.1996) (quoting Quaker State Oil Refining Corp. v. Garrity Oil Co., 884 F.2d 1510, 1513 (1st Cir.1989)). In Quaker State, the First Circuit Court of Appeals held that

"[t]he objectionable conduct must attain a level of rascality that would raise an eyebrow of someone inured to the rough and tumble world of commerce." 884 F.2d at 1513 (quoting Levings v. Forbes & Wallace, Inc., 8 Mass.App.Ct. 498 (1979)).

Plaintiff makes no unique arguments related to his Chapter 93A claim and this Court determines that he has offered no evidence sufficient to show defendants committed unfair or deceptive acts warranting recovery under M.G.L. c. 93A. Summary judgment will, therefore, be granted to defendants with respect to Count IV.

3. Count V - "Good Faith and Reasonableness"

Plaintiff alleges in Count V that 1) defendants' actions were motivated by anti-competitive reasons rather than by legitimate concerns for quality patient care, 2) they had no reasonable basis for taking those actions, and 3) they have acted in bad faith. Plaintiff requests that he be awarded damages as a result of defendants, bad faith and unreasonable acts against him. Because this Court has concluded that defendants are immune from liability, damages under this count or any other count cannot be awarded.

Even if the defendants were not immune or plaintiff had requested injunctive relief under this count, it does not appear that Count V states a claim upon which relief can be granted. Fed.R.Civ.P. 12(b)(6) Even if it did, defendants would be entitled to summary judgment because plaintiff has presented no evidence that bad faith or an anti-competitive motive entered into defendants' decision-making process. There is therefore no genuine issue of material fact before

this Court with respect to Count V and summary judgment will be granted to defendants on it.

ORDER

For the reasons stated in the Memorandum, defendants, joint motion for summary judgment on all counts of the complaint is **ALLOWED.**

So Ordered.

/s/
Nathaniel M. Gorton
United States District Judge

DATED: March 28, 1997

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 97-1565

RONALD E. EGAN,
Plaintiff, Appellant,

v.

ATHOL MEMORIAL HOSPITAL, ET AL.,
Defendants, Appellees.

JUDGMENT
Entered: January 6, 1998

This cause came on to be submitted on the briefs and original record on appeal from the United States District Court for the District of Massachusetts.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:
Phoebe Morse, Clerk.

JANICE M. O'NEIL
By _____
Chief Deputy Clerk.

[cc: Messrs: Egan, Dibble and Laurence]

APPENDIX C

[NOT FOR PUBLICATION]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 97-1565

RONALD E. EGAN,
Plaintiff, Appellant,

v.

ATHOL MEMORIAL HOSPITAL, ET AL.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Nathaniel M. Gorton, U.S. District Judge]

Before
Torruella, Chief Judge,
Boudin and Stahl, (Circuit Judges.

Ronald E. Eagn on brief pro se.

Francis D. Dibble, Jr., J. Michael Scully and Bulkley, Richardson and Gelinas, LLP on brief for appellee Athol Memorial Hospital.

Gerard R. Laurence, Karyn Polito and Milton, Laurence & Dixon on brief for appellee Yong Min Chi, M.D.

January 6, 1998

Per Curiam. After carefully reviewing the record and the parties' briefs, we affirm the district court's judgment for essentially the reasons stated in its Memorandum and Order, dated March 28, 1997. We add only that summary judgment was proper on the antitrust claims because appellant failed to submit any facts from which the court could conclude, either directly or by inference, that the actions of the appellees harmed competition in any way. See Benjamin v. Aroostook Med. Ctr., Inc., 113 F.3d 1, 1-2 (1st Cir. 1997) (per curiam).

Affirmed. See Local Rule 27.1

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 97-2041

RONALD E. EGAN,
Plaintiff, Appellee,

v.

ATHOL MEMORIAL HOSPITAL, ET AL.,
Defendants, Appellants.

JUDGMENT
Entered: June 4, 1998

This cause came on to be submitted on the briefs and original record on appeal from the United States District Court for the District of Massachusetts.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The motion of appellants' for attorneys' fees filed in this court is denied and all other pending motions are denied as moot.

The judgment of the district court is affirmed.

No costs.

By the Court:
Phoebe Morse, Clerk.

JANICE M. O'NEIL

By _____
Chief Deputy Clerk.

[cc: Messrs: Egan, Dibble and Laurence]

(2)

Supreme Court, U.S.
FILED
SEP 25 1998
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No. 98-381

In The

Supreme Court of the United States

October Term, 1997

RONALD E. EGAN, M.D.,

Petitioner,

v.

ATHOL MEMORIAL HOSPITAL, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

Petitioner omitted Robert G. Knight, M.D. and Yong Min Chi, M.D. from his list of the parties to the proceeding in the court whose judgment he seeks to have reviewed. Pursuant to Supreme Court Rule 29.6, respondent Athol Memorial Hospital states that its parent company is Greater Quabbin Health System, Inc. and that it has no nonwholly owned subsidiaries.

TABLE OF CONTENTS

Page

PARTIES TO THE PROCEEDING i

TABLE OF AUTHORITIES iii

CITATIONS OF THE OPINIONS AND JUDGMENTS BELOW 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 3

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

Department of Banking v. Pink, 317 U.S. 264 (1942) 5

Federal Communications Comm'n v. League of Women Voters of Cal., 468 U.S. 364 (1984) 4

Federal Trade Comm'n v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206 (1952) 4

STATUTES

42 U.S.C. § 11111 (1995) 2, 5

42 U.S.C. § 11113 (1995) 3

RULES

Fed. R. Civ. P. 54(d) 3

Sup. Ct. R. 10 6

Sup. Ct. R. 13 4

Sup. Ct. R. 14.1(e) & (f) 5

Sup. Ct. R. 14.1(g) 5

Sup. Ct. R. 14.4 ..... 5, 6

Sup. Ct. R. 29.6 i

CITATIONS OF THE OPINIONS AND JUDGMENTS BELOW

The Memorandum and Order of the United States District Court for the District of Massachusetts allowing respondents' motion for summary judgment on all counts of petitioner's complaint is reported at 971 F. Supp. 37 (D. Mass. 1997), 1997 U.S. Dist. LEXIS 10023, 1997-1 Trade Cas. (CCH) ¶ 71809 (D. Mass. March 28, 1997). A copy of that Memorandum and Order is attached to the Petition for a Writ of Certiorari (hereinafter the "Petition") as Appendix A (Petition 1a-22a). Judgment entered in the district court on March 31, 1997. A copy of that judgment was omitted from the Petition and is attached to the Appendix to this brief (hereinafter "App.") as Appendix 1 (App. 1). The district court's judgment was affirmed by the United States Court of Appeals for the First Circuit (hereinafter the "Court of Appeals") in an unpublished *per curiam* opinion. See *Egan v. Athol Memorial Hospital*, 134 F.3d 361 (1st Cir. 1998) (table format), reported in full at 1998 U.S. App. LEXIS 220, 1998-1 Trade Cas. (CCH) ¶ 72032 (1st Cir. January 6, 1998). A copy of that opinion is attached as Appendix C to the Petition (Petition 24a-25a) and a copy of the judgment entered in the Court of Appeals in accordance with that opinion is attached to the Petition as Appendix B (Petition 23a). An unpublished *per curiam* opinion of the Court of Appeals in connection with respondents' separate appeal of the district court's denial of respondents' post-judgment motion for an award of costs and attorneys' fees is reported in full at 1998 U.S. App. LEXIS 12496 (1st Cir. June 4, 1998). A copy of that opinion was omitted from the Petition and is attached to this brief as Appendix 2

(App. 2-3). A copy of the judgment entered in connection with that opinion is attached to the Petition as Appendix D (Petition 26a).

STATEMENT OF THE CASE

Because the Petition fails to set forth any of the material facts or to recite accurately the procedural history of this matter, respondents submit the following summary statement of the case:

On October 7, 1994, petitioner filed a complaint for damages and injunctive relief against Athol Memorial Hospital (hereinafter the "Hospital"), its president, and ten (10) doctors on its medical staff. Petition 1a. The complaint was based on actions taken in a medical "peer review" process which in 1994 resulted in termination of petitioner's medical staff membership and privileges at the Hospital. *Id.* On April 1, 1996, respondents jointly moved for summary judgment on all counts. *Id.* at 1a-2a. Petitioner opposed the motion for summary judgment. *Id.* On March 28, 1997, the district court issued a Memorandum and Order. *Id.* at 1a-22a. After finding that the respondents were immune from damage liability pursuant to the Health Care Quality Improvement Act of 1986 (hereinafter "HCQIA"), 42 U.S.C. § 11111 (1995) *et seq.*, and finding that respondents were ir any event entitled to summary judgment on the merits of all of petitioner's claims, the district court granted respondents' motion on all counts. Petition 13a-14a, 22a. Judgment entered for respondents on March 31, 1997. App. 1. Petitioner filed a notice of appeal from that judgment,

and, on January 6, 1998, the Court of Appeals affirmed the judgment in an unpublished opinion. Petition 24a-25a. Judgment entered in the Court of Appeals on that date. Petition 23a.

Meanwhile, on April 14, 1997, respondents moved the district court, pursuant to Fed. R. Civ. P. 54(d) and the fee-shifting provision of HCQIA, 42 U.S.C. § 11113 (1995), for an award of the "cost of the suit," including reasonable attorneys' fees, of defending against petitioner's claims. App. 2-3. On April 24, 1997, petitioner filed an opposition to the motion for attorneys' fees and costs. *Id.* On August 12, 1997, the district court denied respondents' motion. *Id.* Respondents filed a notice of appeal with respect to that order on September 5, 1997. *Id.* The district court's order denying respondents' motion was affirmed by the Court of Appeals in an unpublished opinion on June 4, 1998, and judgment entered in the Court of Appeals in connection with that appeal on that date. App. 2-3; Petition 26a. Petitioner filed his Petition on September 1, 1998.

REASONS FOR DENYING THE WRIT

The Court should deny the Petition for the following reasons:

1. The Petition is untimely. This case generated two appeals and, as a result, two judgments entered in the Court of Appeals. The first appeal, Court of Appeals No. 97-1565, was by petitioner from the underlying judgment against him. Judgment entered on that appeal, in accordance with the Court of Appeals unpublished *per curiam*

opinion, on January 6, 1998. The second appeal, Court of Appeals No. 97-2041, was filed by respondents in connection with the district court's denial of respondents' post-judgment motion for costs and attorneys' fees. Judgment entered on that appeal, in accordance with a second unpublished *per curiam* opinion, on June 4, 1998. Petitioner was required to file his petition for a writ of certiorari within ninety (90) days of the entry of the first judgment – not the second judgment – in the Court of Appeals. Sup. Ct. R. 13. The time to petition for a writ of certiorari begins to run anew from a second judgment entered by the Court of Appeals in the same case *only* if the second judgment "changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered." *Federal Trade Comm'n v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211 (1952) (citations omitted). "The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality." *Id.* at 212 (citations omitted). Here, the first judgment entered by the Court of Appeals on January 6, 1998, addressed petitioner's appeal of the underlying judgment against him on the merits of the case. The second judgment dealt with the appeal filed by respondents with respect to the denial of their post-judgment motion for costs and attorneys' fees. Not only did the second appeal not change matters of substance, or resolve a genuine ambiguity, in the first judgment, it addressed completely different legal issues, rights and obligations. *See Federal Communications Comm'n v. League of Women Voters of Cal.*, 468 U.S. 364, 373

n.10 (1984) (award of attorneys' fees is "uniquely separable from the cause of action that is settled by a court's judgment on the merits"). The second judgment, therefore, did not extend or renew the time for petitioner to seek a writ of certiorari. Because petitioner did not file the Petition within ninety (90) days of the date of entry of the first judgment of the Court of Appeals (January 6, 1998), his petition is untimely. This Court, therefore, lacks jurisdiction over the Petition and should deny it. See *Department of Banking v. Pink*, 317 U.S. 264, 268 (1942) (untimely petition in civil case "must . . . be denied for want of jurisdiction").

2. The Petition fails to provide a concise statement of the basis for jurisdiction in this Court and omits many of the statutory provisions involved in this case. *See* Sup. Ct. R. 14.1(e) & (f). For example, much of the district court's decision granting respondents' motion for summary judgment, which was affirmed by the Court of Appeals for essentially the reasons stated by the district court, rested on the application of the immunity provisions of HCQIA, 42 U.S.C. § 11111 (1995), *et seq.*, to the facts of this case. The Petition fails to identify or address this statutory provision. The Petition also fails to present in any coherent or complete fashion "the facts material to consideration of the questions presented" as required by Rule 14.1(g). In sum, the Petition fails "to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration" and should be denied. Sup. Ct. R. 14.4.

3. It is clear from a review of the questions presented and the reasons for granting certiorari stated in the Petition that there is no basis for the Court to grant a

writ of certiorari in this case. Indeed, petitioner has made no argument that the Court of Appeals entered a decision in conflict with a decision of another United States court of appeals, decided an important federal question in a way that conflicts with a decision by a state court of last resort, or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for the exercise of this Court's supervisory power. *See* Sup. Ct. R. 10. Nor has petitioner argued that the Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions in this Court. *Id.* In fact, petitioner's argument as to why certiorari should be granted in this case makes no sense. *See* Sup. Ct. R. 14.4. The Petition, for example, refers to a directed verdict being entered in this case and relies almost exclusively on an argument that the district court erred in refusing to admit certain evidence proffered by petitioner. Petition 4, 8-13. The district court, however, granted a motion for summary judgment – not a directed verdict – and did not refuse to admit or consider any evidence presented by petitioner. Petition 1a-22a. The decision of the Court of Appeals was factually and legally correct, and petitioner has presented absolutely no "compelling reasons" why a writ of certiorari should be granted with respect to that decision. Sup. Ct. R. 10.

CONCLUSION

The Petition was not filed within the jurisdictional time limits, fails to present with any accuracy, brevity or clarity what is essential to ready and adequate understanding of the points requiring consideration, and does not otherwise present any issue which warrants review by this Court. For all of these reasons, the Petition should be denied.

Respectfully submitted,

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APPENDIX 1

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

RONALD E. EGAN, Plaintiff(s), v. ATHOL MEMORIAL HOSPITAL, et al., Defendant.	)	CIVIL ACTION NO. 94-40158-NMG

JUDGMENT

GORTON, D.J.

In accordance with this Court's Memorandum and Order issued on *March 28, 1997*, allowing the defendants' Motion for Summary Judgment, it is hereby ORDERED;

Judgment for the defendants.

BY THE COURT,

/s/ Deborah F. Shattuck
Deputy Clerk in Charge

DATED: March 31, 1997

APPENDIX 2

[NOT FOR PUBLICATION – NOT TO BE CITED AS PRECEDENT]

United States Court of Appeals
For the First Circuit

No. 97-2041

RONALD E. EGAN,

Plaintiff, Appellee,

v.

ATHOL MEMORIAL HOSPITAL, ET AL.,

Defendants, Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Nathaniel M. Gorton, *U.S. District Judge*]

Before

Torruella, *Chief Judge*,
Boudin and Stahl, *Circuit Judges*.

Ronald E. Egan on brief pro se.

Francis D. Dibble, Jr., J. Michael Scully and *Bulkley, Richardson and Gelinas* on brief for appellants Athol Memorial Hospital.

Gerard R. Laurence, Karyn Polito and *Milton, Laurence & Dixon* on brief for appellant Yong Min Chi, M.D.

June 4, 1998

Per Curiam. We have carefully reviewed the briefs and the record in this case and conclude that the district court did not abuse its discretion in denying the motion of appellants for costs and fees under 42 U.S.C. § 11113. *See Maine Audobon Soc'y v. Purslow*, 907 F.2d 265, 269 (1st Cir. 1990) ("[w]here evaluative judgments in discretionary matters are concerned, the trier's choice among plausible alternatives" cannot amount to abuse of discretion).

The motion of appellants for attorneys' fees filed in this court is *denied* and all other pending motions are *denied* as moot.

The judgment of the district court is *affirmed*. No costs.